

1 IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

2 AT KNOXVILLE

3 MAY 1997 SESSION

FILED
APRIL 23, 1998
Cecil Crowson, Jr.
Appellate Court Clerk

4
5 WILLIE BACON, JR.,)

6)
7 Appellant,)

No. 03C01-9605-CR-00203

8)
9)
10 Hamilton County

11 v.)

Honorable Douglas A. Meyer, Judge

12)
13 STATE OF TENNESSEE,)

(Post-Conviction)

14)
15 Appellee.)

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17
18 For the Appellant:

For the Appellee:

19
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41 OPINION FILED: _____

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44 AFFIRMED

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46 Joseph M. Tipton
47 Judge
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55 **OPINION**

56

57 The petitioner, Willie Bacon, Jr., appeals as of right from the Hamilton
58 County Criminal Court's denial of post-conviction relief after an evidentiary hearing. He
59 contends that he is entitled to post-conviction relief because the reasonable doubt and
60 malice instructions given at his trial violated his due process and equal protection rights
61 and because he received the ineffective assistance of counsel. We disagree and affirm
62 the judgment of the trial court.

63

64 In 1989, the petitioner was convicted of first degree murder and received
65 a sentence of life imprisonment. This court affirmed his conviction. State v. Willie
66 Bacon, Jr., No. 1164, Hamilton County (Tenn. Crim. App. Aug. 4, 1992), app. denied
67 (Tenn. Dec. 14, 1992). The petitioner filed the present petition for post-conviction relief
68 on May 13, 1994.

69

70 A transcript of the petitioner's trial is the only evidence that was introduced
71 at the evidentiary hearing on his post-conviction petition. At the hearing, the petitioner's
72 attorney argued that the malice and reasonable doubt jury instructions given at the
73 petitioner's trial violated his constitutional rights. She also argued that the petitioner
74 received the ineffective assistance of counsel because his trial counsel failed to object
75 to the state's closing argument, failed to object to the reasonable doubt and malice jury
76 instructions, and failed to challenge the sufficiency of the convicting evidence on
77 appeal.

78

79 In its order denying the petition, the trial court stated that the reasonable
80 doubt and malice jury instructions did not violate the petitioner's constitutional rights and
81 that the petitioner did not receive the ineffective assistance of counsel. Specifically, the
82 court found that the petitioner's counsel made a tactical decision not to object during

83 the state's closing argument. The court also stated that although the petitioner's
84 counsel did not challenge the sufficiency of the convicting evidence, this court
85 examined the convicting evidence and concluded that the evidence sustained the
86 conviction.

87

88 I. REASONABLE DOUBT JURY INSTRUCTION

89 The petitioner contends that he is entitled to post-conviction relief
90 because the use of the term "moral certainty" in the reasonable doubt jury instruction
91 given at his trial allowed the jury to convict him based on a lower standard of proof than
92 is constitutionally required. We disagree.

93

94 The following instruction was given at the petitioner's trial:

95 Reasonable doubt is not that doubt that may arise from
96 possibility, but is that doubt engendered by an investigation of
97 all the proof in the case and an inability, after such
98 investigation, to let the mind rest easily upon certainty of guilt.
99 Absolute certainty of guilt is not demanded by the law to
100 convict of a criminal charge, but moral certainty is required as
101 to every proposition of proof requisite to constitute the offense.

102

103 This is a correct statement of the burden of proof for criminal trials in Tennessee. See
104 Nichols v. State, 877 S.W.2d 722, 734 (Tenn. 1994); State v. Sexton, 917 S.W.2d 263, 266
105 (Tenn. Crim. App. 1995); Pettyjohn v. State, 885 S.W.2d 364, 366 (Tenn. Crim. App.
106 1994). Thus, the instruction did not violate the petitioner's constitutional rights.

107

108 II. MALICE JURY INSTRUCTION

109 Next, the petitioner contends that the trial court's jury instruction regarding
110 malice violated his due process rights. See Sandstrom v. Montana, 442 U.S. 510, 99
111 S. Ct. 2450 (1979); State v. Bolin, 678 S.W.2d 40, 45 (Tenn. 1984). The trial court
112 gave the following instruction at the petitioner's trial:

113 Malice is an intent to do injury to another, a design
114 formed in the mind of doing mischief to another.

115 Malice may be express or implied. Express malice is
116 actual malice against the party slain and exists where a person

117 actually contemplates the injury or wrong he inflicts. Implied
118 malice is malice not against the party slain, but malice in
119 general, or that condition of the mind which indicates a wicked,
120 depraved, and malignant spirit, and a heart regardless of social
121 duty and fatally bent on mischief. Implied malice may be found
122 to exist where the wrongdoer did not intend to slay the person
123 killed but death resulted from a consciously unlawful act done
124 intentionally and with knowledge on the wrongdoer's part that
125 the act was directly perilous to human life. In this event, there
126 is implied such a high degree of conscious and willful
127 recklessness as to amount to that malignity of heart
128 constituting malice.
129

130 As with other issues, the question of malice may be
131 decided from direct or circumstantial evidence, or both. It is for
132 the jury to decide under all the facts and circumstances of the
133 case whether malice was present in the slaying.
134

135 If a deadly weapon is handled in a manner so as to
136 make the killing a natural or probable result of such conduct,
137 the jury may infer malice sufficient to support a conviction of
138 murder in the first degree. But, again, this inference may be
139 rebutted by either direct or circumstantial evidence or by both
140 regardless of whether the same be offered by the defendant or
141 exists in the evidence of the state. . . .
142

143 Malice cannot be inferred from deadly intent only,
144 because the deadly intent may be justifiable under the law, as
145 where one willfully kills another to save his own life or to save
146 himself from great bodily harm and the danger is imminent and
147 immediate, or if it were sudden and upon reasonable
148 provocation the killing might or might not be manslaughter, but
149 it would not be murder.
150

151 You are reminded that the state always has the burden
152 of proving every element of the crime charged beyond a
153 reasonable doubt. A permissible inference may or may not be
154 drawn from an elemental fact from proof by the state of a basic
155 fact. However, all inferences permitted to be drawn may be
156 rebutted. Such permissive inference does not place any
157 burden of proof of any kind upon the defendant.
158
159

160 In Sandstrom, the Supreme Court held that an instruction which effectively
161 tells the jury that they are to presume the existence of malice, when such is an element
162 of the offense, impermissibly shifts the burden of proof to the defendant. Sandstrom,
163 442 U.S. at 524, 99 S. Ct. at 2459. However, the trial court in this case did not instruct
164 the jury to presume the existence of malice. Taken as a whole, the instruction created
165 a permissive inference. See Bolin, 678 S.W.2d at 42-45; see also State v. James

166 Blanton, No. 01C01-9307-CC-00218, Cheatham County (Tenn. Crim. App. Apr. 30,
167 1996), app. pending (holding that a similar instruction did not violate Sandstrom). Thus,
168 the instruction did not violate the petitioner's constitutional rights.

170 III. INEFFECTIVE ASSISTANCE OF COUNSEL

171 Finally, the petitioner contends that he is entitled to post-conviction relief
172 because he received the ineffective assistance of counsel. The petitioner contends that
173 his counsel was ineffective for failing to object to the state's closing argument, failing to
174 object to the malice and reasonable doubt instructions that were given at his trial, and
175 failing to challenge the sufficiency of the convicting evidence during his direct appeal.
176 The state counters that the petitioner has failed to demonstrate that his counsel was
177 deficient and that he suffered any prejudice from the alleged deficiencies.

178
179 The burden was on the petitioner in the trial court to prove his allegations
180 that would entitle him to relief by a preponderance of the evidence.¹ Brooks v. State,
181 756 S.W.2d 288, 289 (Tenn. Crim. App. 1988). On appeal, we are bound by the trial
182 court's findings unless we conclude that the evidence preponderates against those
183 findings. Black v. State, 794 S.W.2d 752, 755 (Tenn. Crim. App. 1990). In this respect,
184 the petitioner has the burden of illustrating how the evidence preponderates against the
185 judgment entered. Id.

186
187 Under the Sixth Amendment, when a claim of ineffective assistance of
188 counsel is made, the burden is upon the petitioner to show (1) that counsel's
189 performance was deficient and (2) that the deficiency was prejudicial in terms of
190 rendering a reasonable probability that the result of the trial was unreliable or the
191 proceedings fundamentally unfair. Strickland v. Washington, 466 U.S. 668, 687, 104 S.
192 Ct. 2052, 2064 (1984); see Lockhart v. Fretwell, 506 U.S. 364, 369-72, 113 S. Ct. 838,

¹ For post-conviction petitions filed after May 10, 1995, petitioners have the burden of proving factual allegations by clear and convincing evidence. T.C.A. § 40-30-210(f).

193 842-44 (1993). Our supreme court has also applied this standard to the right to counsel
194 under Article I, Section 9 of the Tennessee Constitution, State v. Melson, 772 S.W.2d
195 417, 419 n.2 (Tenn. 1989), and to the right to appellate counsel under the Fourteenth
196 Amendment. Campbell v. State, 904 S.W.2d 594, 596 (Tenn. 1995); see Evitts v.
197 Lucey, 469 U.S. 387, 105 S. Ct. 830 (1985).

198

199 The petitioner contends that his attorney was deficient for failing to object
200 to the following remarks the prosecuting attorney made during the state's closing
201 argument:

202 Mr. Bacon would have you believe that he simply
203 forgot, I guess. I guess it's what you might term selective
204 amnesia. "Oh, yeah, I remember when he assaulted me.
205 Oh, yeah, I remember falling through the door. Oh, yeah, I
206 remember dropping the knife. Oh, yeah, I remember
207 running away. Oh, yeah, I remember getting in the car."
208 Whoa, wait a minute. What about the 35 stab wounds? Oh,
209 is this the defense? Yes, I committed first degree murder,
210 but now I've forgotten about it. Okay, so you committed first
211 degree murder and you've forgotten about it.

212 The trial court found that the petitioner's attorney acted within the range of competence
213 demanded of defense attorneys when he made a tactical decision not to object to these
214 remarks. We agree with the trial court's assessment. The petitioner has failed to
215 demonstrate that these remarks were improper or that he was prejudiced by them.

216

217 We also disagree with the petitioner's contentions that his counsel was
218 ineffective for failing to object to the reasonable doubt and malice jury instructions that
219 were given at his trial. As previously discussed, the instructions given at the petitioner's
220 trial were proper.

221 Finally, the petitioner contends that his counsel was ineffective for failing
222 to challenge the sufficiency of the convicting evidence during his direct appeal. The
223 state counters that the petitioner's counsel acted competently when he made a tactical
224 decision not to challenge the sufficiency of the evidence. The state also argues that the

225 petitioner has failed to show that he was prejudiced by his counsel's failure to present
226 the sufficiency of the evidence on appeal.

227

228 We agree with the state that the petitioner has failed to show that he was
229 prejudiced by his counsel's failure to challenge the sufficiency of the convicting
230 evidence. When viewed in the light most favorable to the state, see State v. Cabbage,
231 571 S.W.2d 832, 835 (Tenn. 1978), the proof at trial showed that the petitioner asked a
232 friend to drive him to the victim's home. Before they left for the victim's house, the
233 petitioner changed clothes. The petitioner "tucked" his clothes in a manner that
234 indicated that he had something concealed under his clothes. After arriving at the
235 victim's house, the petitioner entered the house, where he stabbed the victim during a
236 struggle. The petitioner continued to stab the victim after the victim exited the house.
237 The petitioner stabbed the victim a total of thirty-five times, killing him. The proof at trial
238 indicated that the petitioner killed the victim as punishment or revenge related to an
239 unsuccessful drug transaction.

240

241 Based on the proof presented at trial, the jury was justified in concluding
242 that the petitioner was guilty of first degree murder. Thus, the petitioner has failed to
243 demonstrate that his attorney was deficient for failing to challenge the sufficiency of the
244 evidence on appeal and has failed to demonstrate that he suffered any prejudice from
245 his attorney's decision not to raise the issue.

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